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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

WALDEMAR R. HELMHOLZ, as sole devisee and legatee under the Will of IRENE C. HELMHOLZ, deceased,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI.

BRIEF FOR THE RESPONDENT.

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No. 827.

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OCTOBER TERM, 1934.

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

WALDEMAR R. HELMHOLZ, as sole devisee and legatee under the Will of IRENE C. HELMHOLZ, deceased,
Respondent.

On Petition for Writ of Certiorari.

BRIEF FOR THE RESPONDENT.

Opinions Below.

The opinion of the Board of Tax Appeals is at pages 12-23 of the Record and is reported in 28 B. T. A. 165.

The opinion of the United States Court of Appeals for the District of Columbia is at pages 41-45 of the Record and is reported in 75 F. (2) 245.

The Statute.

The case arises under section 302 of the Revenue Act of 1926 (C. 27, 44 Stat. 9). So far as the petition for certiorari, on its face, is concerned only sub-section (d) of

section 302 is involved; yet, as we see the case, sub-section (f) also is involved, though perhaps only collaterally. Section 302, (d) and (f), provide:

> Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated——
>
> * * * * * *
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke * * *.
>
> * * * * * *
>
> (f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will * * *.

Questions.

The petition presents the question as to whether subsection (d), *supra*, requires that certain stock which was transferred by the decedent to a trustee nine years prior to her death should be included in her gross estate for purposes of the Estate Tax. More specifically it is, (a) whether certain words in the instrument creating the trust merely define the duration of the trust or are to be treated as provisions for its revocation, and (b), if the latter, whether they amount in the effectual and legal sense to provisions for revocation, since such revocation is dependent upon the consent of the beneficiaries.

The Board of Tax Appeals and the Court of Appeals for the District of Columbia held the trust irrevocable.

The Facts.

Chronologically and very briefly stated, the facts as found by the Board of Tax Appeals, are as follows:

By an instrument dated and executed June 7, 1918, the decedent, Irene C. Helmholz,—her father and mother and her sisters and brothers also being parties and making similar transfers—transferred 999 shares of stock in The Patrick Cudahy Family Company to a trustee, the latter to receive from time to time the dividends paid on the stock and, after deducting the expenses of administration, to distribute the net amount (a) to herself for life, (b) remainder to her appointee by will for life, and (c) remainder to her issue.

The instrument provided that no appointment should be for longer than the natural life of the appointee (R. 32), and, excepting corporations organized for charitable purposes, that appointments should be made only to natural persons (R. 35).

The instrument further provided, in paragraph (D), that in case a settlor, or "subscriber," should die without surviving issue, and in any one of several other specified events, the trustee should pay the dividends received by it in respect of the stock deposited by such deceased settlor "to the surviving subscribers or their issue living at the time of distribution proportionately by right of representation" (R. 33).

Regarding the termination of the trust, it was provided:

> Fifth: The term of the primary trust hereby created shall end (1) upon the death of the last surviving grandchild of Patrick and Anna M. Cudahy, they being then deceased, or (2) upon delivery to the said trustee of a written instrument signed by all of the then beneficiaries, other than testamentary appointees, declaring said trust term at an end, or (3) upon delivery to said trustee of a copy (certified by the president or secretary of The Patrick Cudahy Family Company, and under its corporate seal) of a resolution adopted by unanimous vote of the board of directors of said corporation declaring said trust term at an end, whereupon and in either of said events the said trustee shall distribute the capital stock of said The Patrick Cudahy Family Company to the beneficiaries then entitled to receive the net dividends thereon other than testamentary appointees; excepting the shares to the dividends upon which such testamentary appointees are entitled, which shall be held by said trustee as hereinbefore provided.
>
> The term of the primary trust hereby created shall also terminate upon the dissolution of said The Patrick Cudahy Family Company in the manner and for any of the causes provided by law, whereupon the trustee shall distribute all the proceeds and assets by it received upon the liquidation of said corporation to the beneficiaries other than testamentary appointees then entitled to receive net dividends or income in the proportion in which they are severally entitled, excepting the proceeds and (or) assets of shares to the net dividends or income upon which testamentary appointees are entitled, which shall continue to be held in trust as hereinbefore provided.

> The term of the primary trust hereby created shall also terminate upon the extinction of issue of the said Patrick and Anna M. Cudahy, they being then deceased, whereupon the said trustee shall convey and transfer the stock of said The Patrick Cudahy Family Company to the Wisconsin Trust Company as trustee, to have and to hold the same upon the trusts and for the uses and purposes embraced in a certain resolution or declaration of trust adopted by the board of directors of the Wisconsin Trust Company May 24, 1915, establishing a certain community trust known as the Milwaukee Foundation for administration and distribution as in said trust declaration prescribed and defined, subject, however, to any existing valid testamentary appointments made by subscribers hereto as hereinbefore provided (R. 33-34).

Irene C. Helmholz died October 19, 1927, leaving a will by which she devised and bequeathed her property to her husband, Waldemar R. Helmholz, the respondent. The will was held by the Wisconsin courts to have been a valid exercise of the power of appointment reserved in the trust instrument (R. 17).

Argument.

Counsel for the Commissioner has undertaken to yoke together this case and *Commissioner* v. *City Bank Farmers Trust Co.*, No. 805, and on the present petition has submitted one brief for the two. He also states that sixty-seven other cases are pending in the Bureau of Internal Revenue involving the construction of section 302(d) of the Revenue Act of 1926. Despite, however, this apparent effort of counsel to have the Court deal with these cases

en masse, or at least to view the situation as one presenting a novel question common to all of them, we are entirely confident that each of the two cases now before it on petitions for certiorari will be disposed of solely upon the basis of its own facts; and, further, that in doing so the Court will give scant weight to the circumstance that other section 302(d) cases, each, of course, with juridical features peculiar to itself, are pending in the bureau. That condition probably has existed ever since the section was enacted and doubtless will continue as long as the statute remains on the books.

The real reason back of the present petition and the accumulation of other cases, we venture very respectfully to suggest, is not so much a doubt as to what the law is as it is the proverbial inability of the tax collector to view a tax question from but one angle, plus an unyielding reluctance on the part of the ~~respondent~~ petitioner and his predecessors to accept the common-sense interpretation which this Court and various intermediate appellate courts have placed upon the statute.

Duration, Not Revocation, Import of Language Used.

No power whatever to "alter or amend" the trust is reserved in the indenture. A brief supplementary agreement was executed by the voluntary action of all the settlors, but that was before the original instrument had been executed by or delivered to the trustee (R. 35).

Furthermore, in form at least, there is no provision at all in the instrument for a *revocation* of the trust, since the language used simply defines the *duration* of the trust as distinguished from a revocation of it before it has run the allotted time. The words of the indenture are:

> The term of the primary trust hereby created *shall end* (1) upon the death of the last surviving grandchild of Patrick and Anna M. Cudahy, they being then deceased, (2) upon delivery to the said trustee of a written instrument signed by all of the then beneficiaries, other than testamentary appointees, declaring said trust at an end • • • (R. 33).

Besides, although not deemed at all essential to the application of the principle enunciated by this Court in the case cited under the heading next following, yet it seems germane at this point to refer to the provision, already quoted, that, in the event a subscriber dies leaving no issue surviving, the dividends of such subscriber shall be paid "to the surviving subscribers or their issue living at the time of distribution." It thus is clear that each subscriber, not only as regards himself or herself but also as regards his or her issue, has a direct and very substantial interest in the *continuance* of the trust agreement, and hence is to be presumed to decline cooperation with any subscriber who might propose its termination.

As Beneficiaries Must Consent, Trust Not Revocable.

However, even treating the provisions in paragraph "Fifth" of the indenture as though they stipulated in so many words for a power of revocation, every one of them —except the first, which obviously is no provision for revocation—requires for the exercise of the power the cooperation of other subscribers and beneficiaries. That fact, we submit, renders the trusts absolute and irrevocable in the eyes of the law.

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, decided more than six years ago, it was, upon full consideration and

for a reason whose validity would seem incontrovertible, definitely held that where the power to revoke a trust is contingent upon the consent of the beneficiary it does not amount to a power of revocation at all. Speaking for a unanimous Court, Mr. Justice Stone, at page 346, said:

> Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.

By the terms of the trust instrument in the case at bar, not only are the issue of each settlor made beneficiaries *quoad* that settlor's interest, but under subdivision (D) of paragraph "Fourth" of the indenture (R. 33) each settlor and each settlor's issue is constituted a potential beneficiary of every other settlor's interest. Moreover, the whole plan obviously was designed by the father to unify and to continue in his descendants as far as possible the ownership of the estate he had accumulated. Consequently but little freedom of action was allowed any individual "subscriber." He or she could exercise a restricted power of testamentary appointment, and that was all that any of them, acting singly, was permitted to do under the provisions of the agreement.

The Revenue Act of 1921 was the one under consideration in *Reinecke* v. *Northern Trust Co., supra.* Whilst that Act contained no provision corresponding to section 302 (d) of the Act of 1926, here involved, and whilst the question there arose with reference to the provision covering interests "intended to take effect in possession or enjoyment at or after death," yet the principle laid down obvi-

ously is as applicable here as it was there. Seven separate trusts were involved. Counsel for the Commissioner contended that the power of revocation reserved by the settlor did not cease until his death, and hence that the latter event was the point at which the transfer actually took place. This Court sustained that contention with respect to two of the seven trusts, however, upon the distinct ground that as to those two "there was reserved to the settlor *alone* a power of revocation of the trusts, upon the exercise of which the trustee was required to return the corpus of the trust to him." But as to four of the other five trusts the power of revocation could not be exercised without the consent of the beneficiaries, and as to the remaining trust without the consent of a majority of the several beneficiaries, and it was held that none of those five trusts was includable in the decedent's gross estate, because of that vital difference between them and the two other trusts.

Manifestly, the whole point of the decision was and is, that where a trust can be revoked only with the consent of the beneficiary the nominal power of revocation is thereby so neutralized as, in contemplation of law and also as a practical matter, to be treated as non-existent. The principle, we submit, is as applicable and controlling here as it was held to be there; for if a qualifying clause in a provision purporting to reserve the right of revocation takes from the provision its essence and vitality as a revocatory stipulation, then necessarily the provision becomes unavailable in any connection in which the existence of the power of revocation is essential.

The construction put upon section 302 (d) by the Board of Tax Appeals and by the Court of Appeals for the District of Columbia was placed upon it also in *White* v.

Erskine (C. C. A. 1), 47 F. (2) 1014, *Lit* v. *Commissioner* (C. C. A. 3), 72 F. (2) 551, and *White* v. *Poor* (C. C. A. 1), 75 F. (2) 35.

Counsel, at page 14 of their brief, state that the reasoning of the Court of Appeals for the First Circuit in *White* v. *Erskine, supra,* "was repudiated by this Court in *Porter* v. *Commissioner,*" 288 U. S. 436. Quite true, but not on the point here involved, for the questions presented in the two cases, respectively, as an attentive reading of the opinions will show, were altogether different. In the *Porter Case* the settlor had reserved the right to "modify or alter" without the consent of anybody, whereas in *White* v. *Erskine* the trustee's consent was required. However, the conflict of view to which counsel refers did not relate to that difference but to another question entirely, namely, as to whether sub-section (d) was restricted in its operation by the terms of sub-section (a). The Court of Appeals had held in *White* v. *Erskine* that it was so restricted, but this Court, in the *Porter Case,* held that (d) was an addition to rather than a sub-division of (a) and therefore stood by itself.

Congress Has Concurred in View Expressed by Court in *Reinecke* v. *Northern Trust Co.*

Although several revenue Acts have been passed since the decision in *Reinecke* v. *Northern Trust Co.* was rendered, which was in 1929, in not one of them has Congress seen fit to undertake to obviate the Court's ruling in that case by providing that the trust shall be deemed and treated as revocable notwithstanding the terms of the instrument may require the consent of the beneficiary to such revocation. It seems clear, therefore, that the legislative branch accepts the view expressed by this Court in that case as

being sound and just, and perhaps also as marking the limit of constitutional safety respecting the exercise of the taxing power in such matters. As to the latter we cite *Nichols* v. *Coolidge*, 274 U. S. 531, 542, and *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 348.

Indeed, Congress itself, even prior to *Reinecke* v. *Northern Trust Co., supra*, had formally adopted and incorporated in tax legislation the principle and policy that the transfer should not be taxable where the power of revocation is subject to the consent of the beneficiary. For example, in sub-section (g) of section 219 of the Revenue Act of 1924 it was provided, regarding the tax on the income of estates and of property held in trust, that it should apply, *inter alia*, to cases "Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person *not a beneficiary of the trust*, the power to revest in himself title to any part of the corpus * * *." And the italicized qualification was carried into all subsequent Acts, namely, those of 1926 (Sec. 219 (g)); 1928 (Sec. 166); 1932 (Sec. 166, where the language of the qualification was somewhat broadened to read "not having a substantial adverse interest"); and 1934 (Sec. 166).

Amendment of Section 302 (d) by Revenue Act of 1934 Conclusive as to Congressional Intent.

Referring to the 1934 Act, we respectfully submit that nothing short of convincing significance is to be accorded the fact that although, by section 401 of that Act, section 302 (d) of the Revenue Act of 1926 was amended and enlarged in certain particulars, yet no provision whatever was inserted requiring trust property to be included in the

gross estate of the decedent where the exercise of the power of revocation hinges upon the consent of the beneficiary. This fact, we submit, precludes any other view than that Congress is quite content, so far as that point is concerned, to let sub-section (d) continue to be construed and administered in the light of this Court's decision in *Reinecke* v. *Northern Trust Co., supra*, and in the light of the several other later decisions of lower appellate courts holding expressly that section 302 (d) does not apply where the beneficiary's consent to the revocation must be obtained.

Sub-section (f) of Section 302 Governs as to Respondent's Equitable Life Interest.

Perhaps this feature is not presented by the petition for certiorari. Nevertheless, it seems to us to be one which should be kept in mind.

Sub-section (f) of section 302 of the Revenue Act of 1926, so far as pertinent here, reads:

> (f) To the extent of any property passing under a *general* power of appointment exercised by the decedent (1) by will, * * * (R. 32).

The trust agreement provides that "No appointment hereunder shall be effective for a longer period than *the natural life* of the appointee," and the supplemental agreement says that appointments shall be made only to *natural* persons or corporations or organizations created for charitable purposes (R. 35). These restrictions clearly render the power a special and limited one, since sections 232.05 and 232.06 of the *Wisconsin Statutes* define a *general* power as one which authorizes an alienation *"in fee * * * to any alienee whatever,"* and a *special* power as one which author-

izes an alienation "of a particular estate *or interest less than a fee.*".

These provisions of the statute apply to personal property also (*Cawker* v. *Dreutzer* (Wis.), 22[illegible] N. W. 401, 413). See also *Leser* v. *Burnet* (C. C. A. 4), 46 F. (2) 756, 758.

If, therefore, the equitable life interest of the respondent is to be included in the gross estate of the decedent, it must, we submit, be by virtue of sub-section (f), and by virtue of that sub-section only, since it is elementary in the law of statutory construction that the general provisions of a statute yield to provisions which deal specifically with one phase of the general subject to which the statute as a whole relates. It was definitely so held by this Court in *United States* v. *Chase*, 135 U. S. 255, 260.

See also *Caldwell* v. *Steinfeld* (C. C. A. 9), 294 F. 270, and *Old Dominion Land Co.* v. *United States* (C. C. A. 4), 296 F. 20. *Porter* v. *Commissioner*, 288 U. S. 436, which holds in effect that each of the sub-sections of section 302 rests upon its own bottom, also would seem in point.

In consideration of all which, we ask that the petition for the writ of certiorari be denied.

Respectfully submitted,

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April, 1935.

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